Supreme Court, U.S.
FILED
AUG 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PACIFIC GAS AND ELECTRIC COMPANY,
a California Corporation,
Petitioner,
vs.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

BRIEF OF REAL PARTY IN INTEREST INDEPENDENT ENERGY PRODUCERS ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Real Party in Interest Independent Energy Producers Association disagrees with petitioner's statement of the issue because it is based on a false premise. Petitioner Pacific Gas and Electric Company has not been required by the California Public Utilities Commission to pay prices in excess of those authorized by the Public Utility Regulatory Policies Act of 1978 and therefore the California Supreme Court's denial of the petition below was correct. Independent Energy Producers Association submits that a correct statement of the issue is as follows:

Did the California Supreme Court err in declining to substitute its judgement for the California Public Utilities Commission's determination of avoided cost pursuant to the Commission's federal mandate, and the Commission's enforcement of its own standard contract requirements implementing that federal mandate?

STATEMENT PURSUANT TO RULE 28.1 OF THE RULES OF THE SUPREME COURT

Independent Energy Producers Association is a non-profit trade association of qualifying facility developers whose membership is as follows:

Aero Vironment, Inc.

Altamont Energy Corporation

Amos & Andrews, Inc.

Arbutus Corporation

Arco Solar, Inc.

Association of California Energy Officials

Basic American Foods

Big Valley Lumber Co.

Brady, Matt, Esq.

California Almond Growers Exchange

Calpine Corporation

Castor, Jon

Catalyst Energy Development

Centennial Energy

Cogeneration Capital Associates

Cogeneration Service Bureau

Collins Pine Company

Commercial Union Capital Corporation

Continental Wind & Sunshine Company

Conversion Industries

Coram Energy Corporation

Core Ventures, Inc.
Corn Products
Corstar
Diamond Shamrock/Thermal Power Company
Downey, Brand, Seymour & Rohwer
Dow Chemical Company
Energy Conversion Industries
Energy International, Inc.
Fairhaven Power Company
Fluor Venture Group, Inc.
Forward Power & Energy Co., Inc.
Gas Recovery Systems
Geoproducts Corporation
Georgia-Pacific Corporation
Grattan, Gersick & Karp
Grueneich & Lowry
GWF Power Systems Company
Hawthorne Engine Systems
Helmbold & Stewart, Inc.
Henwood Associates, Inc.
Herzog Contracting Corp.
Howden Wind Parks, Inc.
Independent Hydro Developers
Independent Power Corp.
International Power Technology
JBS Energy, Inc.
Robert D. Kahn & Company

Koppers Company, Inc.
J. Laurain & Associates
Long Beach (The City Of)
Louisiana-Pacific Corp.
Luz Engineering Corp.
Marron Reid & Sheehy
Mega Renewables
Mill & Sulphur Creek Power Plant Partnership
Miller, Taylor O.
Morse, Richard, Weisenmiller & Associates, Inc.
National Energy Associates
Natural Resource Ventures
Nevada Irrigation District
Northwest Power Company, Inc.
O'Brien Energy Systems, Inc.
Pacific Lighting Energy Systems
Pacific Thermonetics, Inc.
Renewable Energy Ventures, Inc.
Renewable Resource Systems, Inc.
Roseburg Lumber Company
San Gorgonio Farms
Santa Fe Pacific Realty Corp.
Sierra Hydro, Inc.
Sierra Pacific Industries
Signal Environmental Systems, Inc.
Simpson Timber Company
Solar Center (The)

Solar Turbines, Inc.
Thermo Electron (Energy Div.)
Tosco Cogeneration, Inc.
Ultrapower, Inc.
University of California
U.S. Windpower
Verle A. Williams & Assoc. Inc.
Windmaster
Wood & Associates
Yanke Energy Inc.
Zond Systems, Inc.

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vs.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF OF REAL PARTY IN INTEREST INDEPENDENT ENERGY PRODUCERS ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Contrary to petitioner's assertions, this is not a case where the respondent Public Utilities Commission of the State of California (Commission) ordered actions in violation of any federal statute, is not a case involving an important question of federal law and is not a case involving a conflict between state supreme courts. The

determinations by the Commission rested entirely on its enforcement of petitioner's obligation to purchase electric power from qualifying facilities[1] (QFs) at petitioner's avoided cost as determined by the Commission and reflected in Commission approved standard contracts.

The Commission is the state regulatory authority with ratemaking authority over public electric utilities, including petitioner. As such, the Commission is *required* under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C.A. §§796 and 824a-3 (PURPA) to implement and enforce rules of the Federal Energy Regulatory Commission (FERC) under which electric utilities are required to purchase electric power made available from QFs at a price equal to the utility's avoided cost.[2] *See*, 18 C.F.R. Part 292; 16 U.S.C.A. §824a-3(f).

In the exercise of its jurisdiction under PURPA and FERC rules, the Commission approved the development and use of standard contracts being a "complete transaction, including prices, interconnection requirements, and other relevant factors." Decision 82-01-103, 8 Cal.P.U.C.2d 20, 39. The prices contained in standard contracts constitute *by definition*, the utility's avoided cost, as pointed out by the Commission:

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[1] A qualifying facility is a cogeneration or small power production facility meeting certain criteria respecting size, fuel use, non-utility ownership and efficiency which, on that basis, are exempt from most regulation under the Federal Power Act and state laws regulating electric utilities. *See*, 16 U.S.C.A. §§796(17) and (18); 18 C.F.R. 292.101(b)(1).

[2] " 'Avoided costs' means the incremental cost to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. §292.101(b)(6).

> "In adopting the parameters for rates that will be part of the standard offers, we are establishing a definition for a utility's avoided costs to be applied when purchasing energy from qualifying facilities under the terms and conditions of a specified standard contract." Decision 82-01-103, 8 Cal.P.U.C.2d 20, 40.

Thus the Commission, in the exercise of its jurisdiction and authority, has determined that payments made pursuant to a standard offer *constitute* payment of the purchasing utility's avoided cost. The Commission has therefore necessarily also determined that such payments may not be challenged because they differ from some other determination of avoided cost as proposed by petitioner.

Although the Commission was not constrained by FERC rules to utilize the standard contract approach, it was (and remains) constrained to implement the federal law in a manner calculated to "encourage" QF development. 16 U.S.C.A. §824a-3. This fact is important because the Commission has no jurisdiction to effect a basis for payment to QFs at less than the purchasing utility's full avoided cost.

> "On February 19, 1980, FERC issued its final rules implementing Section 210. These regulations require that electric utilities purchase electric energy and capacity from qualifying cogenerators and small power producers at a rate equal to the utility's avoided cost of generating the power itself or purchasing it elsewhere." Decision 82-01-103, 8 Cal.P.U.C.2d 20, Finding of Fact No. 7.

Aside from the fundamental fact that QFs are entitled to receive full avoided cost, QFs are also entitled to select one of two bases upon which those costs are determined. At the QF's sole election, avoided cost may be determined at the time the QF's power is delivered, or determined in advance

at the time the obligation is made to deliver power, for deliveries to occur in the future. 18 C.F.R. §292.304(a). Accordingly, in Decision 82-01-103 the Commission ordered the development of both "short run" (avoided cost payments determined from time to time) and "long run" (avoided cost payments forecasted in advance) standard contracts. Decision 82-01-103, 8 Cal.P.U.C.2d 20, 41-42.

The standard contracts in the case at bench, designated by the Commission as "Interim Standard Offer 4," are long-run contracts and thus require petitioner to make payments which are calculated at the time the contract was executed for "energy," "firm capacity" and "as-available capacity"[3] to be delivered in the future. Decision 83-09-054; Appendix to Petition, p. A-2. These payments are equal by definition to petitioner's long-run avoided cost. Decision 82-01-103, 8 Cal.P.U.C.2d 20, 40.

The contracts in the case at bar were executed by petitioner and individual QFs in 1985 and allow the QF five years within which to commence operation. The contracts provide that the QF shall receive a fixed firm capacity payment based on the year the QF achieves firm operation and fixed energy and as-available capacity payments for the first ten years of operation.

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[3] Electric power consists of both energy and capacity. Energy is measured in kilowatt-hours and is what makes electric equipment work. A utility's avoided cost of energy consists of the variable costs (fuel, operation, maintenance, etc.) of producing a kilowatt-hour. Capacity is measured in kilowatts and is the capability of producing energy. A utility's avoided cost of capacity consists of the capital costs of a generating facility capable of producing energy. Capacity is "firm" if generating capability is assured during peak consumption periods. Capacity is "as-available" if the timing of generating capability is not so assured due to uncertain fuel availability, equipment outages or inability or unwillingness of the QF to contractually commit to a firm capacity obligation.

The case below arose out of petitioner's failure to make available to the Real Parties in Interest an Interim Standard Offer 4 contract containing pricing provisions meeting the criteria of the Commission's order approving the contract. In particular, although such contracts were entered into in 1985 (and thus contemplated QFs becoming operational as late as 1990), petitioner failed to provide a firm capacity price for operation dates after 1987. Petitioner also failed to provide forecasted energy and as-available capacity values for years after 1997 although Interim Standard Offer 4, both by Commission orders and its own provisions, requires the payment of such forecasted prices for the first ten years of operation. As a result of petitioner's dereliction, Real Parties in Interest asked the Commission for an order that petitioner complete these price schedules.

In a series of decisions, the Commission determined that its prior orders and the contracts (1) require petitioner to establish a payment schedule for firm capacity calculated for the term of the contract at the time the contractual obligation was incurred (Decision 86-10-038, Finding of Fact No. 4; Appendix to Petition, p. A-137), (2) entitle the QF to have that firm capacity price based on the date of initial firm capacity availability (Decision 86-12-013, Conclusion of Law; Appendix to Petition, p. A-144), and (3) guarantee up to ten years of energy and as-available capacity price certainty (Decision 86-10-038, Finding of Fact No. 6; Appendix to Petition, pp. A-147, 148).

In denying the petition below without comment, the California Supreme Court necessarily determined that in acting as it did the Commission acted in the regular pursuit of its authority. Cal. Pub. Util. Code §1757; *Goldin v. Public Utilities Commission*, 23 Cal.3d 638, 592 P.2d 289 (1979). There is no substantial federal question or any federal question at all. The California Supreme Court did not err in declining to substitute its judgment for the Commission's

determination of petitioner's avoided cost and enforcement of its own orders.

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE ISSUED

I

A Writ of Certiorari Should Not Be Issued Because There Is No Federal Question In That Petitioner Has Not Been Required To Make Payments To Qualifying Facilities In Excess Of Avoided Cost.

Contrary to petitioner's contention, the case at bar does not involve a determination that petitioner should or must make payments to QFs in excess of avoided cost and, therefore, does not involve the scope of the Commission's authority under PURPA, FERC rules or any other federal law or statute. Instead, the case at bar merely involves an order of the Commission, consistent with federal law, that petitioner come into compliance with the terms of a Commission order and approved standard contract under which petitioner was required and agreed to pay QFs based on petitioner's long-run avoided cost.

Petitioner acknowledges (Petition, p. 19) that FERC rules require that QF power sold under a fixed term agreement be priced at avoided cost calculated *either* at the time of delivery or at the time the power purchase agreement is executed, and that the election between those alternatives is at the QF's sole option. The standard contracts in the case at bar were approved by the Commission for use by QFs making the election to be paid avoided cost calculated at the time the power purchase agreement is executed, referred to as the long-run avoided cost. "Interim Standard Offer No.

4 was our first attempt to implement power purchase contracts based on utilities' *long-run avoided costs.*" Decision 86-10-038; Appendix to Petition, p. A-128. The determination of long-run avoided cost necessarily involves the use of projections and "the same sort of planning (such as lengthy forecasts of the purchasing utility's resource mix and costs) that goes into a utility decision to build a new power plant." *Id.* p. A-129.

Petitioner erroneously contends that the Commission ordered petitioner to make payments in excess of avoided cost, claiming that it "showed that the prices greatly exceed the current forecasts of the value of additional, not yet operational resources." Petition, p. 19. In fact, petitioner states no basis for concluding, and there has been no determination, that its current forecasts are more accurate than the forecasts used by the Commission. As the Commission stated, petitioner's allegation would require a "crystal ball." Decision 86-10-038; Appendix to Petition, p. A-127. Petitioner's contention is a *non sequitur* in any event because a comparison of the Commission approved long-run avoided cost applicable to the contracts in the case at bar (reflecting expectations at the time the contracts were executed) with petitioner's current estimates of long-run avoided cost is simply not relevant because the question whether the Commission approved prices exceed petitioner's avoided cost at the time of delivery is likewise not relevant. FERC's rules expressly provide as much:

> "In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate PURPA or the FERC rules if the rates for such purchases differ from avoided costs at the time of delivery." 18 C.F.R. 292.304(b)(5).

Unlike all other utilities subject to the Commission's order,[4] petitioner's forecasted price schedules did not consider all the years when qualifying facilities signing contracts might permissibly come on-line pursuant to those contracts. *See*, D.86-10-038, Appendix to Petition, p. A-129. It was therefore necessary and proper for the Commission to order the completion of petitioner's forecasted price schedules.

The Commission's determination to order petitioner to complete the forecasted price schedules was clearly correct and required to give effect to the clear meaning and purpose of the contracts. That determination was clearly correct with respect to the firm capacity forecasted price schedule because the contracts provide that the QF's on-line date may occur any time within five years of execution and it is apparent that forecasted firm capacity price values must be stated for each of those five years in order to effectuate the contract. The Commission's determination with respect to the energy and as-available capacity forecasted price schedules was clearly correct because the contract defines the "fixed price period" as "[t]he period during which forecasted or levelized energy prices, and/or forecasted as-delivered capacity prices, are in effect" and "the first ten years of the term of agreement if the term of agreement is anywhere from 20 through 30 years." Appendix to Petition, p. A-197.

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[4] Petitioner is one of three California utilities which were required to execute Interim Standard Offer 4 contracts with QFs. Because the other two, Southern California Edison Company and San Diego Gas & Electric Company, maintained forecasted prices of adequate duration to effectuate their contracts and comply with the Commission orders, only petitioner Pacific Gas and Electric Company was involved in the case below.

Therefore, in ordering petitioner to complete the forecasted price schedules the Commission did not amend any contract and did not require petitioner to pay QFs a price different from its best estimation of petitioner's long-run avoided cost. Since the Commission's action was required under PURPA and the FERC rules its action necessarily is not violative of these federal mandates as petitioner contends, and therefore no federal question is involved in this case.

II

A Writ Of Certiorari Should Not Be Issued Because The Case At Bar Does Not Involve Or Promise To Resolve A Conflict Among Different Courts As To The Proper Interpretation Of PURPA Or Any Other Matter Of Interest To This Court.

Petitioner erroneously contends that the case at bar raises an important federal issue that is national in scope based on an alleged conflict created by two state court decisions interpreting PURPA. The cases cited as conflicting by petitioner are *Kansas City Power & Light Co. v. State Corp. Commission*, 234 Kan. 1052, 676 P.2d 764 (1984) *and Consolidated Edison Co. v. Public Service Commission*, 63 N.Y.2d 424, 472 N.E.2d 981 (1984), appeal dismissed, 470 U.S. 1075 (1985). Contrary to petitioner's contention, these cases do not even conflict with each other and the case at bar does not conflict with either.

Consolidated Edison considered the question whether PURPA preempts states from legislating a minimum purchase price from QFs rather than a variable avoided cost rate. The Court of Appeals of New York held that PURPA does not preempt the state legislature from requiring

electric utilities to pay for energy from qualifying facilities at a rate greater than those electric utilities' avoided cost, a determination which this Court refused to upset.

Kansas, in contrast, did not involve a statute similar to New York but dealt with a state Commission's authority to decline to enforce the FERC rules in favor of its own determination of appropriate rates for purchases from qualifying facilities. The Kansas Corporations Commission declined to establish avoided cost, in favor of an alternative state basis for establishing the prices which utilities must pay for power from qualifying facilities. The *Kansas* court concluded that the Kansas Commission was required by PURPA and the FERC regulations to set rates for the purchase of power from qualifying facilities based on the utility's avoided cost.

Consolidated Edison and *Kansas* are not factually similar and are not in conflict at all.

Petitioner's suggested conflict between *Kansas* or *Consolidated Edison* and the case at bench is also without merit because, unlike the case at bench, *Consolidated Edison* and *Kansas* each involved an affirmative determination to require utilities to pay greater than avoided cost. While petitioner compares certain California statutes with the situation in both New York and Kansas, it fails to point out that in the case at bench there has been no determination to require petitioner to pay more than avoided cost and that the decisions below are devoid of any reference to any authority to establish rates different from avoided cost. Thus, petitioner's statement of the issue is hypothetical. As petitioner points out, "it [the Commission] has never defined 'equitable rates' as anything other than 'avoided cost' " and the Commission "chose avoided cost as the standard to be applied in California" and, petitioner concludes, "the Commission has never attempted to deviate

from that standard, even in authorizing interim SO4." Petition, p. 18.

Thus, whatever independent state authority the Commission may have, petitioner's general allegations are defeated by its own argument since the Commission's actions consisted entirely of the establishment of petitioner's long-run avoided cost and the enforcement of petitioner's obligation to pay those prices to QFs under the contracts and numerous prior Commission decisions implementing PURPA and the FERC rules. Unlike *Consolidated Edison* there has been no invocation of a state authority independent of PURPA and the FERC rules. Unlike *Kansas* there has been no determination by the Commission to eschew its obligations under PURPA and the FERC rules. Unlike both *Consolidated Edison* and *Kansas* there has been no determination that petitioner must pay any amount other than its avoided cost. There is therefore no conflict with decisions of other courts and there is no federal question supporting this petition.

III

CONCLUSION

The determination of the California Supreme Court to decline petitioner's bid to review the decisions of the California Public Utilities Commission enforcing petitioner's obligations under PURPA, FERC rules and Commission approved contracts and orders, is correct. Furthermore, contrary to petitioner's contention, the decision of the California Supreme Court does not involve a question of federal law and does not conflict with any decision of any other state's highest court. A writ of

certiorari should therefore not be issued and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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